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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., a minor, ALLISON BRENNEISE and ROBERT BRENNEISE, Plaintiffs, v. SAN DIEGO UNIFIED SCHOOL DISTRICT Defendant.	Case No.: 08 CV 0028 WQH (WMc) OPPOSITION TO MOTION TO DISMISS THIRD AND FOURTH CLAIMS HON. WILLIAM Q. HAYES Place: Courtroom 4, Fourth Floor Date: May 12, 2008 Time: 11:00 a.m. **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**

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I. THE BRENNEISES HAVE STANDING TO SEEK A REMEDY FOR THE DISTRICT'S FAILURE TO COMPLY WITH THE HEARING OFFICE DECISION IN VIOLATION OF THE IDEA

A. The District's Standing Argument Fails Because the Brenneises Are, In Fact, Aggrieved Parties, Thus Providing Access to the Federal Court

The Third Claim in plaintiffs' First Amended Complaint alleges that the District failed and refused to comply with the OAH Decision because it failed and refused to implement Student's December 4, 2006 IEP, as modified by that decision. Specifically, the District failed and refused to provide a school nurse to personally assist with Student's g-tube feedings and further failed and refused to provide Student with occupational therapy ("OT") services from his then-current OT provider, as ordered in the OAH Decision. The claim further alleges that this failure was, itself, a denial of FAPE in violation of the IDEA, entitling Student to an award of compensatory education.

In its motion to dismiss, the District argues that the Brenneises lack standing to enforce a hearing office decision in federal court because they are not "aggrieved" by that decision, citing 20 U.S.C. 1415(i)(2)(A). The District cites the Ninth Circuit's recent holding in *Levina v. San Luis Coastal Unified School District*, 514 F.3d 866 (9th cir. 2000), that to be "aggrieved," a party must have been denied relief they affirmatively requested. The District argues that "Plaintiffs are hardly aggrieved by a decision which modified the December 4, 2006 IEP and transition plan related to the g-tube feedings and OT services." In other words, because the Brenneises are seeking to enforce a decision that granted, rather than denied, the relief they were seeking, they are not "aggrieved" as that term is defined in *Levina*.[1]

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[1] Curiously, the District asserts on page 8 of its motion that "the aspects of the decision [the Brenneises] seek to enforce are not in their favor – they were in the District's favor as they are part and parcel of the District's December 4, 2006 IEP." While the Brenneises do not agree with this characterization, to the extent that this is the District's

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On Friday, April 23, 2008, the Ninth Circuit granted the petition for rehearing in *Levina* and withdrew the opinion on which the District relies for the definition of "aggrieved," issuing in its place an unpublished memorandum disposition that does not address the definition of "aggrieved." Plaintiffs' Supplemental Authorities,[2] Exh. A. Moreover, there is no dispute that the Brenneises were not awarded all of the relief that they requested in the administrative proceeding and thus that they are, in fact, "aggrieved" by the OAH Decision. In addition, they are "aggrieved" by the District's failure to implement the decision.

Section 1415 provides that any "aggrieved" party "shall have the right to bring a civil action **with respect to the complaint presented** pursuant to this section." 20 U.S.C. § 1415(i)(2)(A) (emphasis added). Thus, under the plain meaning of the statute, the Brenneises have standing not only with respect to those issues on which it did not prevail, but as to any issue raised in their complaint, including those issues on which it prevailed but which the District subsequently failed to implement.[3]

In *Porter v. Board of Trustees of Manhattan Beach Unif. Sch. Dist.*, 307 F.3d 1064, 1069 (9th Cir. 2002), the Ninth Circuit stated, "[t]here is no dispute that the IDEA

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position, it would appear that the District must concede that the Brenneises are "aggrieved" even as to those portions of the OAH Decision that they are seeking to enforce.

[2] Plaintiffs' Supplemental Authorities and Request for Judicial Notice is filed concurrently herewith.

[3] This case is unlike *Moubry v. Independent School District No. 696*, 951 F. Supp. 867 (D. Minn. 1996) where the plaintiff was simultaneously trying to enforce the very same provisions of the order that it had challenged on appeal. Here, although the Brenneises have appealed some of the hearing officer's rulings, they are not appealing that portion of the order on which the claim for failure to implement is based.

required the implementation of the final decision of the [administrative hearing office]." However, the appropriate mechanism for doing so was not addressed in that case because the parties did not dispute "that the IDEA's right of action provides a proper means to enforce a due process hearing order." Accordingly, the court stated, "we have no occasion to address the holding of [*Robinson v. Pinderhughes*, 810 F.2d 1270, 1274 (4th Cir. 1987)] that *only* a § 1983 action can be used to enforce that order." 307 F.3d at 1070, n. 7 (emphasis original).

However, at least in California, section 1983 does not provide an adequate remedy for failure to comply with an administrative decision because California school districts are state entities, and thus entitled to Eleventh Amendment immunity from suit under section 1983. *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 250 (9th Cir. Cal. 1992). *Compare, Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1142 (9th Cir. Nev. 2002), holding that school districts in Arizona are not state entities, and thus enjoy no Eleventh Amendment immunity.

Although this still leaves the possibility of a *Younger* injunction to require future compliance, it does not afford a remedy against the school district for violations of the order that have already occurred. This would allow a school district to ignore an administrative order – as it has done here – unless and until the prevailing parent initiates a federal court action to obtain injunctive relief. Indeed, this would create a perverse incentive for school districts to ignore administrative orders – particularly orders that require funding for costly services, such as the nursing and private OT services ordered here – because the school district would not only pay no penalty for non-compliance, it would benefit financially from denying services prior to the issuance of an injunction.

While it may still be possible to pursue individual school district officials in their individual capacity[4] for damages under these circumstances, it is clear that section 1983 is not a wholly satisfactory vehicle for enforcing an administrative order against a school district. However, as discussed below, because of the unique nature of the administrative order in this case, it is not necessary for this court to resolve this issue in order to allow the Brenneises to proceed on this claim.

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[4] Of course, this would require the plaintiff to overcome the defense of qualified immunity.

B. Because the OAH Order in This Case Modified the Student's Placement and Services, the Failure to Comply With the Order Constitutes a Violation of the Stay Put Requirement Under the IDEA

The OAH Decision found that in order to receive a FAPE, the District was required to provide a nurse to assist with Student's g-tube feedings and also was required to provide him with ongoing OT services from his current service provider. Under the Supreme Court's holding in *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 372 (U.S. 1985), once a hearing officer orders the school district to provide the placement and services requested by the parent, this constitutes "agreement" by the school district to that placement and services, which become the student's new "stay put" placement under 20 U.S.C. § 1415(j) during the pendency of any further proceedings.

Even if the school district subsequently appeals the hearing office decision, absent a court-ordered stay, the decision is binding on the school district as soon as it is issued, and must be implemented unless and until it is reversed on appeal. Cal. Educ. Code § 56505(f). Thus, in *Clovis Unified School Dist. v. California Office of Administrative Hearings*, 903 F.2d 635, 641 (9th Cir. Cal. 1990) the Ninth Circuit held that a school district is responsible for the cost of funding a student's stay put placement arising from an administrative decision, regardless of whether it ultimately prevails on appeal of that decision. *See, Doe v. Brookline School Committee*, 722 F.2d 910, 917 (1st Cir. Mass. 1983) (party seeking to modify the stay put must seek an injunction).

Because, under the unique circumstances of this case, the OAH Decision resulted in a new stay put placement,[5] and because failure to implement a stay put placement is, itself, a violation of the IDEA, the District's failure and refusal to comply with the OAH Decision in this case constitutes a separate violation of the IDEA for which the Brenneises are entitled to an appropriate remedy. *See, Porter v. Board of Trustees*, Case No. CV 00-8402 GAF, slip op. at 35, (C.D. Cal. Dec. 21, 2004) (on remand from *Porter v. Board of Trustees of Manhattan Beach*, 307 F.3d 1064 (9th Cir. 2002)). Plaintiffs' Supplemental Authorities, Exh. B.

C. The Third Claim Alleges a Separate Violation of the IDEA For the District's Failure to Implement Student's IEP, As Modified by the OAH Order

The OAH order in this case was somewhat unique in that it directly modified the Student's IEP. Thus it states, "[t]he December 4, 2006 IEP is hereby modified to include the following language on page 2 under the heading of health nursing services" followed by the requirement for a nurse to be available to provide the g-tube feedings. OAH Decision at 74, para. 1.[6] It further states, "[t]he December 4, 2006 IEP transition plan is hereby modified to provide that, until Student reaches phase four of the transition plan, Student's District-funded DIS services will continue with his current NPA providers and at his current levels of service . . . ." OAH Decision at 74, para. 2.

The Third Claim in the First Amended Complaint alleges that the District failed and refused to "implement Student's December 4, 2006 IEP as modified by the OAH

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[5] It is, of course, possible for an administrative decision to include a remedy that does not create a new stay put placement, such as an order to reimburse the parents for the cost of an independent educational evaluation or to provide the student with compensatory education services. Under those circumstances, failure to comply with the order would not give rise to a separate violation of the stay put requirement under the IDEA.

[6] The OAH Decision is attached as Exhibit A to Plaintiffs' First Amended Complaint.

Decision." Complaint ¶ 31. The failure to implement a material element in a Student's IEP is a clear violation of the IDEA for which the remedies under the IDEA are available. Thus, this too is a separate violation of the IDEA for which the Brenneises are entitled to a remedy. *Cf., Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770 (9th Cir. Or. 2007) holding that the failure to implement an IEP must be material in order to constitute is a violation of the IDEA .

D. There is No Exhaustion Requirement With Respect to a Violation That Arises Out of a Failure to Comply with a Hearing Office Decision or a failure to implement an iep

In *Porter v. Board of Trustees of Manhattan Beach*, 307 F.3d 1064 (9th Cir. 2002), as here, the claim was that the failure to comply with the order was, itself, a violation of the IDEA. The Ninth Circuit held that because a hearing office does not have the jurisdiction to enforce its own order, there is no need to exhaust administrative remedies before bringing a federal court action for failure to comply with an administrative order.

The District's attempt to distinguish *Porter* on the grounds that the hearing office decision in that case was final, is unavailing. As discussed above, an administrative order is binding when issued, and thus the obligation to comply with a hearing office order arises immediately upon its issuance. The fact that the decision ultimately becomes final if not appealed, does not make it any more or less binding while it is being appealed. Certainly, there is nothing in *Porter* to suggest that a binding, but not final, order must be enforced through a California Department of Education ("CDE") compliance procedure.

E. Even if OAH Had Authority to Enforce Its Own Orders – Which It Does Not – There is No Exhaustion Requirement When The Issue Is a Failure to Implement an IEP

The District cites *Van Duyn* 481 F.3d at 777-78 and *County of San Diego v. California Special Educ. Hearing Office*, 93 F. 3d 1458, 1465 (9th Cir. 1996), in support of its assertion that "[t]o the extent Plaintiffs are seeking a determination that Student has been denied a FAPE as the result of these failures to implement, a due process hearing through OAH is also an appropriate forum to address these concerns." Motion at 8, n.4.

However, these cases do not support the proposition for which they are cited. Indeed, every court to have considered this issue has held that exhaustion is not required when the sole issue is failure to implement an IEP.

This issue was considered at length in *Joseph M. v. Southeast Delco Sch. Dist.*, 2001 U.S. Dist. LEXIS 2994 (E.D. Pa. Mar. 19, 2001). The court conducted a detailed examination of the legislative history of the IDEA, citing the House Report which identifies the situation where "an agency has failed to provide services specified in the child's . . . IEP," as an example of when exhaustion should be excused as futile. The decision identifies several other statements in the legislative history to the same effect.

The *Joseph M.* court also notes that exhaustion is normally required "where the 'peculiar expertise' of a hearing officer is needed to develop a factual record" and to "resolve evidentiary disputes concerning, for example, evaluation, classification and placement," considerations which do not apply when the only issue is a failure to implement. The court thus concludes that there is an "implementation exception to the exhaustion requirement." *Accord, SJB v. New York City Dep't of Educ.*, 2004 U.S. Dist. LEXIS 13227 (S.D.N.Y. July 14, 2004); *see, Polera v. Bd. of Educ.*, 288 F.3d 478, 489 (2d Cir. N.Y. 2002).

Nothing in *Van Duyn* suggests a contrary result. Indeed, the exhaustion issue is not discussed, presumably because the parent chose to exhaust administrative procedures in that case. *County of San Diego* also is inapposite as it stands for the proposition that the existence of a pending appeal does not excuse the exhaustion requirement with respect to an unrelated issue. However, the unrelated issue had nothing to do with a failure to implement. Obviously, the existence of a pending appeal does not require exhaustion when it is otherwise not required.

In this case, because the administrative order modified the Student's placement and services, it functioned as a new "agreed upon" placement, which gave rise to a new stay put placement. Moreover, the administrative order expressly modified the Student's IEP, which the District then failed and refused to implement. Accordingly, whether viewed as an action for failure to implement a stay put placement or failure to implement the modified IEP, the Brenneises are excused from the exhaustion requirement and are entitled to pursue their claim in this court.

II. THE BRENNEISES ARE ENTITLED TO ATTORNEYS' FEES AS THE PREVAILNG PARTY IN THE CDE COMPLIANCE PROCEDURE

A. The Holding in *Lucht* That the IDEA Permits an Award of Attorneys' Fees Even if There Has Been no Administrative Hearing or Judicial Proceeding Has Recently Been Reaffirmed by the Ninth Circuit and is Binding on this Court

The IDEA provides that "in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(i). Thus, in order to be entitled to an award of attorneys fees, a party must show first, that the proceeding for which they are seeking fees is an "action or proceeding brought under this section," and second, that they were the "prevailing parent" in such action or proceeding.

In *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1029 (9th Cir. Or. 2000), the Ninth Circuit addressed whether the IDEA authorizes an award of attorneys' fees only for administrative hearings. The court squarely rejected such a narrow interpretation of the attorneys' fees provision, stating "Congress intended that attorney fee awards be available in actions and proceedings under § 1415 as well as in impartial due process hearings." 225 F.3d at 1028. The court next considered whether a CDE compliance procedure is an "action or proceeding brought under this section," and concluded that it was. The court stated that to hold otherwise, "would require us to rewrite the statute to substitute 'certain subsections of this section' for 'this section' in § 1415(i)(3)(B)." 225 F.3d at 1029.

The District argues vigorously that the Ninth Circuit got it wrong, and goes so far as to assert that "the reasoning of *Lucht* has not been followed by other circuits, and even by a district court within the Ninth Circuit . . . ." The District further argues that "*Lucht* has been superseded by the judicial imprimatur rule announced in" *Buckhannon v. Board & Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) and *Shapiro v. Paradise Valley Unified School Dist.*, 374 F.3d 857 (9th cir. 2004). Motion at 10. Finally, the District attempts to bolster its position by pointing to the comments to the 2006 IDEA regulations, which opine that attorneys' fees are not available in compliance proceedings because "the State complaint process is not an administrative proceeding or judicial action." Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46602 (August 14, 2006).

First, given that district courts are bound by Ninth Circuit decisions, it is not surprising that the District has mischaracterized the holding in *Melodee H. v. Department of Educ.*, 374 F. Supp. 2d 886 (D. Haw. 2005), the district court case to which it refers. Far from refusing to follow *Lucht,* the *Melodee* court merely found that the analysis in *Lucht* could not be extended to include "proceedings established by state statutory law unrelated to section 1415." 374 F. Supp. 2d at 892.

However, even more troubling is the District's failure to acknowledge that *Lucht's* interpretation of the "action or proceeding" language in the IDEA was expressly approved and followed by the Ninth Circuit in *P.N. v. Seattle Sch. Dist.*, 474 F.3d 1165 (9th Cir. Wash. 2007), which was decided **after** the 2004 amendments,[7] **after** the comments to the regulations cited by the District were published,[8] and **after** *Buckhannon* was issued. The *Seattle Sch. Dist.* decision expressly reaffirmed *Lucht's* interpretation of the "action or proceeding" language stating, "we hold that the IDEA authorizes an action solely to recover attorneys' fees and costs, even if there has been no administrative or judicial proceeding to enforce a student's rights under the IDEA." 474 F.3d at 1169.

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[7] The decision notes that the relevant language in the attorneys' fees provision remained unchanged in the 2004 amendment. 474 F. 3d at 1168, n.1.

[8] The District concedes that "courts are not generally bound by an agency's interpretative regulations." However, the comments on which the District relies do not even rise to the level of an interpretive regulation.

B. A Party Who Receives a Favorable Determination From the CDE, Which Includes Corrective Actions that the District is Required to Take, is a "Prevailing Party" for Purposes of Section 1415

Although it is beyond cavil that under controlling Ninth Circuit law a CDE compliance procedure is an "action or proceeding" for which attorneys' fees may be awarded under section 1415, the issue still remains as to whether the Brenneises were the "prevailing party" in that "action or proceeding," so as to entitle them to attorneys' fees. The District argues that under *Buckhannon*, "a parent cannot be deemed prevailing party for purposes of the IDEA's fee shifting provision unless the relief the parent obtains has been judicially sanctioned in some manner." Because the CDE compliance procedure is not a judicial proceeding, the District argues that it is not possible to be a prevailing party in such a proceeding.

As the Second Circuit discussed in *A.R. v. N.Y. City Dep't of Educ*., 407 F.3d 65 (2d Cir. N.Y. 2005), *Buckhannon's* requirement that to "prevail" a party must have achieved "relief on the merits," and a "material alteration of the legal relationship of the parties," have an "obvious meaning when applied to both judicial actions as in *Buckhannon* and the administrative proceedings before us." 407 F.3d at 76. However, the references to a "judicially sanctioned change in the legal relationship of the parties," "judicial imprimatur," and "judicial approval and oversight" which clearly apply to judicial proceedings, "cannot serve literally as part of a test" for prevailing party in "purely administrative IDEA proceedings." *Id.*

Nevertheless, the Second Circuit concluded that "an IHO's [impartial hearing officer's] decision on the merits in an IDEA proceeding does constitute 'administrative imprimatur.' Although not 'judicial,' such an order changes the legal relationship between the parties: Its terms are enforceable, if not by the IHO itself, then by a court, including through an action under 42 U.S.C. § 1983." *Id.* The Third Circuit reached the same conclusion in *P. N. v. Clementon Bd. of Educ.*, 442 F.3d 848 (3d Cir. N.J. 2006), where it held that the settlement of an IDEA case that was approved by an administrative law judge ("ALJ") was sufficient to meet the *Buckhannon* standard, even though it was not enforceable by the ALJ, because it was "enforceable through an action under 42 U.S.C. § 1983 and under state law . . . ." 442 F.3d at 855.

The Ninth Circuit has not directly addressed the issue of whether "administrative imprimatur" is sufficient to satisfy *Buckhannon*. Nevertheless, that court has not hesitated to rule that a party who receives a favorable decision in an administrative hearing is the prevailing party where the hearing officer's order gives the plaintiff "the ability to "require[] the [school district] to do something [it] otherwise would not have to do." *Parent V.S. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1233 (9th Cir. 2007), *quoting* *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000). Obviously, to hold otherwise would require a finding that Congress suffered some kind of schizophrenic lapse – expressly providing for an award of attorneys' fees in "actions and proceedings" under the IDEA, while at the same time precluding a fee award by restricting "prevailing party" status only to judicial proceedings.

Applying this analysis to CDE compliance procedures, there is no question that a CDE compliance report that includes "required corrective actions, "requires the school district to do something it otherwise would not have to do." In the present case, the CDE corrective actions included, *inter alia*, that "[b]y November 30, 2006, the District of Residence shall provide compensatory services for a minimum of 24 hours of missed English language arts instruction." Plaintiffs' Supplemental Authorities, Exh. C. If the school district fails to comply with a CDE corrective action, the CDE has the authority to bring a "proceeding in a court of competent jurisdiction for an appropriate order compelling compliance." 5 C.C.R. § 4670.

Moreover, like the administrative hearing process, federal law mandates the establishment of state compliance procedures as an alternative means for resolving a claim of denial of FAPE. 34 C.F.R. § 300.151. Once the CDE makes a determination that the school district has denied the student a FAPE and ordered a corrective action, the failure to implement that corrective action would, itself, become a denial of FAPE. As such, a parent could proceed under section 1983 to require the school district to comply.[9] Thus, because a CDE compliance order is enforceable by a court, either on an action initiated by the CDE or by the parent under section 1983, it satisfies the *Buckhannon* prevailing party requirement, as adapted for this type of a proceeding.[10]

Dated: April 28, 2008

Respectfully submitted,

Wyner & Tiffany
ATTORNEYS AT LAW

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Attorneys for Defendants

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[9] Even in California this remedy would be available as a request for injunctive relief as it would fall under the *Younger* exception to Eleventh Amendment immunity.

[10] By contrast, a private settlement of a CDE compliance complaint would not satisfy *Buckhannon*.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of 18 and that I am not a party to this action. On April 28, 2008, I served this OPPOSITION TO MOTION TO DISMISS THIRD AND FOURTH CLAIMS on the San Diego Unified School District by serving their counsel of record electronically, having verified on the court's CM/ECF website that such counsel is currently on the list to receive emails for this case, and that there are no attorneys on the manual notice list.

Dated: April 28, 2008 /s/ Marcy J.K. Tiffany